

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

**NICO ASPHALT PAVING, INC./ and its
SUCCESSOR IN INTEREST and ALTER EGO,
CITY WIDE PAVING, INC.,
Respondents,**

And

Case 29 CA 186692

**UNITED PLANT & PRODUCTION WORKERS,
LOCAL 175, IUJAT; now known as CONSTRUCTION
COUNCIL 175, UTILITY WORKERS UNION of
AMERICA, AFL-CIO;
Charging Party,**

And

**HIGHWAY, ROAD and STREET CONSTRUCTION
LABORERS LOCAL 1010, LIUNA, AFL-CIO,
Party in Interest.**

**Trial Held Before
THE HONORABLE JEFFREY GARDNER, ESQ.
Administrative Law Judge**

**BRIEF ON BEHALF OF CHARGING PARTY
CONSTRUCTION COUNCIL 175, UTILITY WORKERS UNION
OF AMERICA, AFL-CIO**

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INTRODUCTION

NICO ASPHALT PAVING, INC., (herein “Nico”), has been charged with creating an Alter Ego known as CITY WIDE PAVING, INC. (herein “City Wide”). Alternatively, it is charged that City Wide is a disguised continuance of, and successor to, Nico. The facts presented at Trial establish both charges are correct.

GENERAL FACTS:

Nico is an Employer subject to the jurisdiction of the National Labor Relations Act, as is its successor and alter ego, City Wide Paving. [Answer To Complaint, # 2 & 3] Nico and City Wide perform the identical work providing construction services in the five boroughs of New York City in the nature of road restoration using primarily asphalt for the same customers. (Tr/73-76, 102, 106, 110, 202,)¹ At commencement of operations City Wide employed virtually all of the employees of Nico, including management, truckers, operating engineers and asphalt paving workers. [Compare GC Exh 29 with GC Exh 30 for the names of Nico’s employees to the names of City Wide Employees in the 1st quarter of 2016; Tr. 431] The bargaining unit that employed the asphalt paving workers at City Wide was an appropriate bargaining unit of asphalt paving workers just as it was at Nico. [See GC Exhs 9 and 13] The Unfair Labor Practice charge in this matter was filed on October 20, 2016 upon the realization that Nico was still operating, (Tr. 435, 437)(which Nico had continuously previously denied). Predecessor charges had been filed on February 17, 2016, April 8, 2016 and April 26, 2016. (GC Exhs. 1-O, 1-P and 3)

¹ The designation “Tr” refers to pages of the transcript. The designation “GC Exh”

LABOR ORGANIZATION:

At all material times Local 175, United Plant & Production Workers, IUJAT, (herein “Local 175” or “175”), was a labor organization under the Act. Respondents initially admitted that fact in their Answer; but upon learning Local 175 had affiliated subsequent to the events alleged in the Complaint with the Utility Workers Union of America, AFL-CIO, (UWUA), the Respondents moved to Amend their Answer to deny that Local 175 was a labor organization and to allege an affirmative defense that the Charge was time barred. [Tr. 545] But the reality is nothing changed the status of Local 175 as a labor organization during the material times; nor did the Affiliation with another labor organization. [See, GC Exh. 21, which specifically refers to both Local 175 and the UWUA as being Labor Organizations; GC Exh. 21, page 1, 2, 9, & 10]

NICO’S CONTRACT WITH LOCAL 175:

Nico was a member of a Multi-Employer Bargaining Association known as the New York Independent Contractor’s Alliance, Inc., (herein NYICA), since at least May 2000. [GC Exh 4] At that time it had a collective bargaining agreement thru NYICA with Local 1018 of LIUNA. [Id.] Subsequently, in June/July 2005, Nico entered into a collective agreement with Local 175. [GC Exhs. 5,6,7]. And pursuant to an NLRB election conducted on January 18, 2007 [GC Exh 25] Local 175 was Certified by the NLRB as the collective bargaining representative of Nico’s full time and part time workers who primarily performed asphalt paving effective November 15, 2007. (GC Exh 26)[Answer, # 5(a) & (b)]

NYICA, during all material times, was an organization composed of various employers in the construction industry and existed for the purpose of representing its employer members in negotiating and administering collective agreements. [See, Answer, # 6, Tr. 235-243, 246] NYICA negotiated contracts between 2005 and the present time on behalf of its Employer members and the asphalt paving industry.

During the period of time between July 2005 and February 2016, a period of approximately 11 years, Nico followed the terms and conditions of the collective agreement in effect between it, NYICA and Local 175. [GC Exhs GC 8, 9, 36, 20A, 20B, Charging Party Exh 1 & 2; Tr. 94-97, 100-101, 243-246] Moreover, Mr. Michael Pietranico, Sr., (herein sometimes referred to as Pietranico Sr.), Nico's sole owner and shareholder; and its President, was a Board Member of NYICA who participated in collective bargaining between Local 175 and NYICA which resulted in the agreements that Nico was bound to; and which Nico applied to its covered workers. [See GC Exhs 20A, 20B, 22; R 4; Tr. 235-236, 239, 241-246] So there is no doubt that Nico was bound to the 175 collective agreement for all material time frames.

THE CREATION OF CITY WIDE PAVING, INC.:

On December 15, 2015 Nico's President , Michael Pietranico, Sr. and his daughter, DanaMarie Pietranico, who acted variously as Nico's Secretary Treasurer, Office Manager and bookkeeper; [Tr. 71-72 155] caused the Incorporation of a new company named City Wide Paving, Inc. [Compare Tr. 161 with Tr. p. 228-229 & 258; 262; GC Exh 19] The testimony indicated that Michael Pietranico, Sr. formed City Wide and caused John Denegall, his right hand man, to file the paperwork on Pietranico, Sr.'s behalf. [Tr. 228-229, 258, 261] And although John Denegall said

that DanaMarie Pietranico put in the request to have City Wide “filed” [Tr. 161] the actual Incorporation papers filed with the State of New York named Michael Pietranico {sic} as the sole Director of this new company. The address given for City Wide on the incorporation papers was the same address of Nico, 341 Nassau Ave., Brooklyn, NY 11222. [GC Exh 19]

The actual filing for City Wide with New York State was effectuated by John Denegall; who variously acted as Nico’s Vice President, Office Manager, Custodian of Records, and as Pietranico, Sr.’s right hand person responsible for reading all documents and discussing them with Pietranico, Sr. (Tr. 11, 12, 61, 65, 83, 227, 231, 273).² At the time of this December 15, 2015 filing of the City Wide Incorporation papers, John Denegall, Michael Pietranico, Sr. and his daughter, DanaMarie Pietranico, were all employees of Nico; and remained so until the end of February or early March, 2016. And although the paper work submitted by the person requesting the filing of City Wide by Blumberg Corporate Services had been requested; (which document would have shown who was to be its officers or directors); it was never produced; even though Denegall believed he should have it. [Tr. 176-177] Notably, Pietranico, Sr. admitted that he created City Wide for his daughter; for his family. [Tr. 261, 262] So Pietranico, Sr. cannot distance himself from City Wide’s creation.

CITY WIDE & LOCAL 1010:

John Denegall knew Joe Sarro, Local 1010’s President for years. Sarro used to come around Nico lots. With the new company formed and in need of a new

² Denegall was described as being like family to the Pietranico’s helping them run both City Wide (Tr. 396-399) and Nico.

union, Denegall and the Pietranico's turned to 1010. (Tr. 199) On January 18, 2016, while still employed by Nico; both John Denegall and DanaMarie Pietranico traveled to the offices of the Party in Interest, Local 1010, LIUNA, where City Wide without negotiation or discussion, executed a collective bargaining agreement with Local 1010. [Tr. 119, 281, 394; GC Exh 13]. At the time of signing that collective agreement with Local 1010, City Wide had no employees. (It was an 8(f) collective agreement under the National Labor Relations Act, Section 8(f).)

On February 12, 2016, in furtherance of their plan to rid themselves of the 175 collective agreement; Michael Pietranico, Sr. and his son, Michael Pietranico, Jr., (who was a Superintendent for Nico, assigning work to the workers, overseeing the jobs, and generally supervising the work performed by Local 175 members); held a meeting at the Nico yard at 9am. (Tr. 286) The Pietranico's announced that if the workers wanted to continue to work they would have to be employed by this new company, City Wide, and they would have to become Local 1010 members—the purported reason being that Local 175 members could no longer work for them on Consolidated Edison [Con Ed] work. [Tr. 286] Local 175's business manager who was at the meeting asked for confirmation of that Con Ed position; but none was provided. (Tr. p 286-287) After that meeting Local 175 members never-the-less continued to work several days on Con Ed work the next week for Nico [Tr. 289-291] but their employment with Nico ceased on or about February 19, 2016. Nico's plan was moved further towards fruition simultaneously with the transfer of all of Nico' book of business to City Wide.

THE TRANSFER OF WORK FROM NICO TO CITY WIDE:

Without notifying Local 175, and after the meeting it had with its workers noted above, Nico entered into a General Service Agreement with Citywide that was intended to ensure all Nico work, after its execution on February 22, 2016, would be performed by City Wide. [GC Exh 12; Tr. 516-526] City Wide in fact kept Nico's phone number so all calls for business would be received by it; and to avoid any "disconnect" in the transfer of work to it from Nico. (Tr. 73) All the while Nico was creating City Wide it also was assuring the continuity of work it received from Con Ed. For decades Nico had been the low bidder on Con Ed construction contracts; and 2015 was no different. In October 2015 Nico had been awarded a three (3) year contract to perform asphalt road restoration for when Con Ed dug holes in the City streets. (GC Exh 16 c) The award also provided for three yearly extensions at Con Ed's discretion. (Id.)

THE CON ED ISSUE:

This Con Ed award was the continuation of many bids awarded to Nico over the years, using Local 175 members. In October, 2014, Con Ed changed the language in its Construction contracts to read that a firm, such as Nico, "*unless otherwise agreed,*" by Con Ed have a collective agreement with a union that belonged to the Building & Construction Trades Council of Greater New York [herein the BCTC] and to use such union labor having jurisdiction over the Work "*to the extent such labor is available.*" [GC 16 c, p. 20 of 54]. ³

³ Con Ed says they made the change in language to avoid the *possibility* of labor strife. But Con Ed has never itemized the potential strife, and none ever occurred or was alleged to have occurred by Con Ed in the long history of Local 175 members

Nico had been awarded the new bid on October 3, 2015 by Con Ed. Nico claimed it was being pushed to change its collective agreement mid term from 175 to Local 1010, LIUNA; the only BCTC union member having jurisdiction over asphalt paving. This claim is made without the production of any document, email, fax or documentary evidence stating that the contract would be terminated if Nico did not produce a 1010 collective agreement. [Tr. 197, 280] Other than Mr. Denegall and Pietranico Sr.'s statements to the effect that the firm was being pushed by Con Ed managers in that direction; there is no proof that Con Ed would have pulled a three year, \$32.750 million dollar contract [GC Exh 16 c, pg 2 of 54] from one of its long time lowest bid contractors only because the union members Nico employed, (which also included Teamsters and Operating Engineers), that had already been performing the same work for a decade; were members of a union that was not a member of the BCTC. [Tr. 197, 280-282]

Instead of asserting that Nico could not employ Local 1010 members under its valid, effective 175 collective agreement; and that "such labor was not available to it under its existing agreement; Nico used the language change to its advantage and plotted to make the change and garner the benefits of lower wages and benefits

working on Con Ed work. See R-6, p 2, fn 2; R-5, p. 19. The decision of the Court reflected in R-6 ignores the legal aspects of the NLRA requirements governing collective agreements and bargaining requirements at the end of contracts. The Court apparently believed an employer could simply walk away from its CBA. The issue for the Employer, however, which the Court ignored; was whether existing agreements with 175 constituted a bar and fell within the caveat "to the extent such labor is available" since there was an existing 175 CBA that prevented the hiring of members of another union to perform work for the employer. And at the end of a CBA term bargaining would be required while the status quo remained in effect; and if Local 1010 was able to file a Petition for an Election they could have done so; if the workers wanted to change union affiliation.

to pay workers; and to enjoy a larger profit margin into the coffers of City Wide. [Tr. 527; Compare GC Exh 9 (175 Contract) & 22 (Wage and Benefit Rate Chart); and CP 1 & 2 (175 Benefit Fund Remittance Forms with Benefit Contribution Rates) with GC Exh 13, pps. 18-19 & 24 of the Local 1010 collective agreement.] The contractual differences between the Local 175 and Local 1010 collective agreements also included a 175 contractual Night Differential of 25% for hours worked at night that was required by the 175 contract; which Local 1010's contract did not require. [GC Exh 15, p. 10; Tr. 201]

What is notable here is that other firms who had 175 collective agreements continued to perform work for Con Ed notwithstanding the amended language of October 2014 in Con Ed's Standard Terms and Conditions of Construction Contracts. Firms such as MECC, Mana, Triumph and Tri-Messine all have 175 agreements and were all doing Con Ed work at the time. (See, Tr. 513) Further, Nico had been informed, on December 2, 2016, in writing that:

Con Edison advised the NLRB that "the fact that Con Ed has awarded contracts to the likes of Mana, MECC, Triumph and Tri-Messine; all of whom continue to have 175 collective agreements demonstrates that the "unless otherwise agreed" provision of the standard terms and conditions for construction contracts, does not serve to invariably preclude contractors, whose employees may be represented by Local 175, from bidding on and being awarded contracts to perform construction work for Consolidated Edison." [Tr. 514-515]⁴

⁴ On December 17, 2014 Con Ed's Assistant General Counsel, Richard Levin wrote the NLRB in regards to a charge filed against Con Ed at 29 CA 140719 . That letter became public in a Rate matter before the NYS Public Utility Commission where Con Ed was asked why they had changed the language in their Standard Terms and Conditions for Construction Contracts. That letter, quoted in part above, indicates, that the amended language in their contract did not preclude contractors with 175 CBAs from bidding on and being awarded contracts to work for Con Ed. That's why Nico was awarded its contract back in October 2015. On December 2, 2016 Nico representatives were advised of the contents of the Con Ed letter. The letter

From the above it can be posited that Nico was actually not being forced to abandon its Local 175 Agreement; but that Nico saw the amended language in the Con Ed contract as a means to gain an advantage for itself.

THE CONVERSION FROM NICO TO CITY WIDE:

Nico decided to make the move in mid February, 2016. Nico let Con Ed know that it had created City Wide, had signed a 1010 collective agreement and was ready to go. The letter from Con Ed dated February 12, 2016 noting authorization to proceed with the work was addressed, not to DanaMarie Pietranico, the alleged President or CEO of City Wide, but was addressed to Michael Pietranico (Sr.) as President of City Wide. Con Ed obviously thought they were still dealing with their long time contractor. That is why the letters were directed to Michael Pietranico as President of City Wide. Pietranico Sr. signed the "Notice to Proceed" on February 15, 2016 as President of City Wide [GC Exh 16 a]. On September 27, 2016, Con Ed forwarded another Purchase Order to City Wide noting the supplier was "Pietranico Michael" with a phone number of 718-302-1600; which was Nico's phone number. [GC Exh 16 b] The City Wide Purchase Order was attached to the Purchase Order given to Nico dated October 3, 2015 and addressed to Nico and Michael Pietranico as the supplier with the Nico phone number of 718-302-1600. [GC Exh 16 c].

As noted above, Nico executed a General Services Agreement with City Wide on February 22, 2016, without consideration; requiring City Wide to provide Nico

demonstrates that Con Ed did not "invariably preclude contractors" with 175 agreements from being awarded bids; as they honored existing 175 collective agreements as falling into the exemption of "to the extent such labor is available" to the contractor. And Nico never called a Con Ed representative as a witness or produced any documents to support its position that it was being forced to create City Wide.

with asphalt paving services and any other services which the parties may agree upon. [GC Exh 12; Tr. p 390-391] The conversion was cemented by the threat to discharge the 175 members; with the statement that if they wanted to work they had to become Local 1010 members. [Tr. 286] And their pitch worked.

The initial payrolls of City Wide, which are for the week ending February 28, 2016 show that 24 former Nico truckers (6), engineers (4) and asphalt workers (15) were at work for City Wide during the period ending February 28, 2016. [GC Exh 28A] There were 12 additional new workers working performing asphalt paving work that week. For the week ended March 27, 2016 there were a total of 27 workers listed as having Dues forwarded to Local 1010; but nineteen (19) of those 27 asphalt workers formerly worked at Nico in the first quarter of 2016. (Compare GC Exh 28E, (City Wide's period ending payroll for March 27, 2016), with GC Exh 29, (Nico's 1st Quarter Payroll which was for the two months of January/February 2016).

On March 23, 2016 DanaMarie Pietranico asserts she went to Local 1010 once again. She signed a document purporting to be a Recognition Card Check. [GC Exh 15; Tr. 393] GC Exh 15 states that 15 cards were allegedly exhibited authorizing Local 1010 to represent the workers in the asphalt paving unit out of 28; at a time when 19 of those working were former 175 members. (Tr. 189-190) When questioned about GC 15 and the March 23rd meeting at Local 1010 DanaMarie Pietranico stated without contradiction that she never reviewed anything. [Tr. 393]. Thus, there was no actual card check. And as noted, a majority of the workers in the asphalt unit employed when the alleged card check occurred had been Local 175

members working at Nico. [See also GC Exh 3, Attachment B which was submitted by Nico as representing workers who worked at Nico and who immediately went to work for City Wide.]

The testimony supports the Complaint's allegation that City Wide granted recognition to and entered into and has maintained and enforced a collective agreement with Local 1010 as the exclusive bargaining representative of the same unit of workers that Local 175 represented at Nico. [See Complaint, Paragraph 14]

ALL NICO'S WORK WENT TO CITY WIDE OVER NIGHT!

Nico gave Citywide the work called for by the Con Ed, Welsbach and Verizon contracts that Nico held. [GC Exhs 10 & 11, Tr. 103-110] City Wide did the Welsbach and Verizon work; Nico billed it out; and who knows what happened to the money. [Tr. 76-78; 414-415, 525] In fact, City Wide was given all of Nico's work to perform. [Id.] City Wide was given Nico's ENTIRE book of business. [GC Exh 12; Tr. 78] Notwithstanding Nico's and City Wide's denials; the testimony and documents establish that Nico established Citywide to continue Nico's business "*for the family.*" (Tr. 262) And the family continued operating the business.

CITY WIDE & NICO ARE ALTER EGOS:

The testimony demonstrates that Nico and Citywide had substantially identical management, business purposes, operations, equipment, customers and supervision. The business purpose of the two companies was identical—both operated in the five boroughs of New York City; both worked the same hours in the streets of New York City (Tr. 75-76); both performed asphalt road restoration for their customers (Tr. 102, 106, 109); both employed Teamsters, Operating Engineers

and Asphalt Paving workers; used the identical types of tools (Tr. 202, 203); used Nico's vehicles, trucks and equipment to perform all of City Wide's work (Tr. 78-82, 359-361, 421); City Wide used the same physical location out of which to operate the business as Nico did without paying rent (Tr. 180, 262); used the same address for their operations and on their business documents (Tr. 500, GC Ex 12, 16a, 16b, 16c); used the same lawyer (Tr. 72), and accountant (Tr. 211); the same phone number (so as to avoid a "disconnect from one company to the other for services, (Tr. 73)); used the same Asphalt provider using Nico's credit line (Tr. 164-165, 177-179, 408, 433); and used the same insurance company (Tr. 182); and Bonding Company to guarantee completion of contracts (Tr. 352-353, 356; GC Exh 34 signed by Pietranico, Sr. as a Principal and President [see acknowledgement] of City Wide).

In terms of Management of the two businesses, John Denegall was the operations manager, Vice President (Tr. 65-66), office manager (Tr. 12), superintendent, custodian of records (Tr. 11), or the generally do everything person for both companies. (Tr.11, 60-62, 231, 396, 399). Denegall used the same computer when he did work for both Nico and City Wide (Tr. 73). Michael Pietranico, Jr. was a superintendent and Engineer for both companies assigning crews to perform work, setting up jobs, and managing the workers day to day (Tr.69- 70). Junior did the same work for City Wide as he did for Nico. (Tr. 410-411) DanaMarie Pietranico worked at Nico running the back office handling the billing, accounts payable, ensuring the union benefit fund contributions were paid and forms filed timely, oversaw the check book, worked with the accountant and helped Denegall maintain the paperwork on the vehicles. (Tr. 71, 155, 371-372) At

Nico she was the Secretary-Treasurer; but at City Wide she called herself the President & Secretary-Treasurer. (Tr. 71) Notably, Michael Pietranico, Sr. was present at the offices of both Nico and City Wide during all relevant times. (Tr. 69) As President of Nico he was out in the field and dealing with John Denegall about the business. Pietranico Sr. signed the early collective agreements with Local 175 on behalf of Nico; was a Board Member of NYICA negotiating collective agreements on behalf of the members of that Multi-Employer Association; and dealt with the labor relations regarding Nico. (Tr. 87, 89-91, 94-95; 234-243)

In regard to City Wide Pietranico Sr. *stated that he created City Wide for the family; for his daughter* [Tr. 261, 262]; and that he had no responsibility for anything at the company (Tr. 190, 382). However, he admitted that he hangs with his kids on job sites or upstairs in the office to see his daughter and occasionally his grandson who goes to the office with his daughter, DanaMarie. He admits to spending a couple of hours several days a week, defined as 3-4 days a week. (Tr. 265-266) at City Wide offices. He allows City Wide to use the premises, which he owns thru a real estate holding company he owns known as Rosal; rent free (Tr.180, 262, 266-267); there is no record that City Wide pays rental for the Nico equipment it freely uses or for the asphalt purchased on Nico's credit from Willet's Point Asphalt. (Tr. 153-155, 178-179, 433) It is asserted here that a snap shot of Nico would look significantly like City Wide if the two pictures were placed side by side.

Moreover, Pietranico, Sr. signed the Bond submitted to Con Ed as the Principal and President of City Wide (GC Exh 34); he signed the documents for Con Ed as President of City Wide (Gc Exh 16 a, b & c); and he owns or controls the

equipment used by City Wide to perform its asphalt paving for all of Nico's customers transferred to City Wide. (GC Exh 35, Tr. 78-79, 81-83) Notably, Pietranico, Sr., although claiming not to be involved in the workings of City Wide, is paid \$20,000 monthly as a Management employee by City Wide out of the goodness of his daughter's heart. (Tr. 411-412; GC Exh 30 page 3; GC Exh. 33 page 5)

In addition, other Nico administrative personnel simultaneously also moved over to work with City Wide. Michael Pietranico, Jr., started working immediately at the end of February at City Wide being paid \$2,496 a week to continue his Nico superintendent job for City Wide; doing the same work. John Denegall continued working for City Wide doing the exact same work he did for Nico earning \$1,600 a week. Chantel James, an Administrative Assistant for Nico (Tr. p. 74-75) and City Wide handled Con Ed tickets entering them into the computer and checking the receipts that came into the firms. She also continued working for the Pietranicos doing the same work at City Wide that she did for them at Nico being paid \$1,000 a week. Linda Tricarico continued to work immediately with City Wide from Nico earning \$2,500 per week working in the office. And DanaMarie Pietranico also continued working for City Wide, from Nico, being paid the same \$1,000 per week, for doing the same work as she did at Nico all the while asserting that she was the President, Secretary-Treasurer of City Wide. (See GC Exh 30 and 33 as compared to GC Exhs 29 and 31).

From these records it is clear that the Management of Nico continued immediately to be employed as the Management of City Wide.

CITY WIDE & NICO MEET THE FACTUAL CRITERIA TO BE ALTER EGOS OF EACH OTHER:

By the facts noted above it is submitted that the General Counsel has proven each of the material allegations set forth in the Complaint, notwithstanding the Respondents' consistent denials. The facts establish that City Wide is the alter ego of Nico; and further that City Wide is a disguised continuance of Nico.

Here we have the facts that ownership was established within the same family, the Pietranico's; that the operations of Nico were totally transferred to City Wide; the two companies perform the same work with the same tools and equipment; having the same people guide the labor relations with substantially identical management, business purpose, operations, customers and supervision. The two companies function out of the same premises, owned by Michael Pietranico, Sr.; that City Wide pays no rent for use of those premises formerly (and currently) used by Nico. City Wide uses Nico's credit line to buy asphalt from the same supplier as Nico did; and City Wide relied on the established name of Michael Pietranico, Sr. to have Con Ed transfer the bid awarded to Nico over to City Wide without City Wide actually bidding for the work or being vetted by Con Ed. The same is true for the Bonding Company who wanted Pietranico Sr. to sign the bond as President of City Wide. (Tr. 356) As Denegall testified, Pietranico, Sr. was identified as President of City Wide at that time **"at the guidance of the bonding company because they wanted him to fill it in"** (Id.)

In terms of "control" Michael Pietranico, Sr. is named the President for both companies on critical documents related to Con Ed and the Bonding Company. He is

named as the sole Director of City Wide on NY State filing documents. He signed the General Services agreement on Nico's behalf giving his daughter, the Secretary-Treasurer of Nico, without apparent consideration, the entire business/customers of Nico to City Wide. It is either his trucks or Nico's equipment that is exclusively used by City Wide to perform the work for all of Nico's former customers. The evidence establishes that both companies have the same personnel handling the labor relations, (Pietranico, Jr., Denegall and Pietranico, Sr.); have common management, (Denegall, DanaMarie Pietranico, Linda Tricarico, Chantel James, Michael Pietranico, Jr. and probably Pietranico, Sr.); have interrelations of operations, (common premises, common equipment, tools, phone number, attorney, accountant, etc.); and common ownership and financial control, (Pietranico, Sr. is listed as the sole Director of City Wide on incorporation filings with NY State; and is designated President of City Wide on the Con Ed contract and the Bond documents guaranteeing City Wide's performance of the contract; and City Wide uses Nico's credit line to purchase all its asphalt; uses Nico's premises without rent payments to operate out of and park the vehicles it uses in its operations which are owned by Nico. The facts establish that City Wide is a not so disguised continuance of Nico. *Omnitest Inspection Services*, 297 NLRB 752, (1990), *enforced*, 937 F.2d 112 (3rd Cir. 1991); *NLRB v. Allcoast Transfer*, 780 F.2d 576 (6th Cir. 1986).

Family relationships are a relevant factor in assessing if common ownership exists, especially when family relationships are established within the context where the owner of one company exercises considerable financial control over the

alleged alter ego.⁵ Here Michael Pietranico, Sr. exercises control financially by allowing City Wide to use the premises he owns; where Nico operated from; without payment of rent; allows City Wide to use Nico's credit lines to purchase asphalt; where City Wide uses his name on Bonding documents because the bonding company wanted his name on the documents; allows City Wide to use Nico's trucks and equipment without any actual evidence that City Wide pays Nico for the use of those trucks or equipment; allows City Wide to use Nico's telephone number so as to prevent a disconnect when customers call; and where the owner of Nico is paid \$20,000 in salary a month by City Wide.

Here, the economic realities of the two collective agreements would provide economic motivation for Nico to want to get out from under its CBA with Local 175. Local 175's CBA has higher wages for laborers and other job classifications; and more expensive benefit contributions. And there was the 25% night differential in wages as well to consider. Denegall conceded that City Wide would enjoy a wider profit margin applying the 1010 CBA rather than the 175 CBA to its asphalt paving work force. (Tr. 527) This certainly forms the basis of a motive to take this action for the "family."⁶

⁵ DanaMarie Pietranico testified that she signed documents as VP of Nico; and that it was "a family business, we don't really have official titles." (Tr 375). The same presumably could be said about City Wide as a family business.

⁶ The Board does not consider that "unlawful motivation" is a necessary element of an alter ego finding. It may be just one of the other criteria that may be germane to the analysis. *Roofers, Waterproofers, & Allied Workers Local 210 v. A.W. Farrell & Son, Inc.*, 547 F. App'x 17 197 LRRM 2454 (2nd Cir. 2013); *C.F.K. Industrial Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 354 (1st Cir. 1997)

What is also important to note is the fact that when a successor corporation “is merely a disguised continuance of the old employer,” alter ego liability binds the successor to the prior agreement. *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 US 249, 259, n. 5 (1974). A Company is not allowed to evade obligations under the NLRA simply by changing or altering its corporate form.

CITY WIDE IS THE SUCCESSOR TO NICO:

The criteria for determining whether one firm is the successor of another firm were laid out in the *Howard Johnson* case. The test is whether there was substantial continuity from one firm to the other. *Van Lear Equipment, Inc.*, 336 NLRB 1059 (2001). Thus, the criteria looked at include: (a) whether there has been a substantial continuity of the same business operations; (b) whether the new employer uses the same plant; (c.) whether the same or substantially the same workforce is employed; (d) whether the same jobs exist under the same working conditions; (e) whether the same supervisors are employed; (f) whether the same machinery, equipment, and methods of production are used; and (g) whether the same product is manufactured or the same services offered. It is submitted that the facts in this case meet all of these criteria.

As noted before, the General Counsel need not establish the existence of all the above criteria in a particular case. The “enterprise continuity determination” is based upon the totality of all the circumstances. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 45 (1987). Continuity of the workforce appears to be the most important of the criteria. *See, e.g., Holly Farms Corp. v. NLRB*, 48 F.3d 1360 (4th Cir. 1995); *NLRB v. Houston Bldg. Ser.*, 936 F.2d 178 (5th Cir 1991), *enforcing* 296 NLRB

808 (1989). In this case the continuity of the workforce is established. The new firm employed the identical management personnel as was employed at Nico; who performed essentially the identical jobs and work; it employed all the same teamsters, the same operating engineers and a majority of the workers who performed asphalt paving and road restoration were identical. There were no operational changes testified to; the work was the same, (except for the possible addition of saw cutting of roadway which came into play after the events relevant here due to changes in the way NY City wanted things done; Tr. 183-184); and the hundreds of Nico customers which would be serviced by City Wide were the same. (See the General Services Agreement, GC Exh 12; Tr. 77-78, 110, 114-115, 414-415) All of Nico's work and customers were transferred, without consideration, to City Wide. City Wide became what Nico used to be in the industry!

CITY WIDE IS BOUND TO THE 175 COLLECTIVE AGREEMENT FROM JANUARY 2016 TO THE PRESENT WHETHER IT IS FOUND TO BE AN ALTER EGO OR A DISGUISED CONTINUANCE OF NICO:

In the circumstances where an alter ego is found; or when a successor is simply the disguised continuance of the predecessor firm, the Board continues to find that the alter ego or the successor employer inherits the collective bargaining obligation of the predecessor firm where a majority of the successor's employees in an appropriate bargaining unit were employed by the predecessor. *See, Galion Pointe, LLC*, 361 NLRB No. 135 (2014), *reaff'g* 359 NLRB No. 88, 195 LRRM 1149 (2013); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). Alter Ego firms are bound to the collective agreement of the predecessor firm.

CITY WIDE CAPITALIZATION HAD TO BE SUPPORTED BY NICO:

To the extent there are any questions as to whom actually capitalized City Wide the Administrative Law Judge should draw inferences against the Respondent as follows. Nico claims all of its records were destroyed by it in April 2016, two months after it claims it ceased operating; after filing what it said were its last Tax Returns. (Tr. 458) The failure of Nico to produce bank records, checks and other documents related to its payment of suppliers; or its payments to or from City Wide deprived the General Counsel of valuable information. Moreover, City Wide did not produce records; nor did DanaMarie Pietranico; showing where the money she claimed to have contributed as capital to City Wide came from. We know a \$70,000 bonus was paid to DanaMarie Pietranico in December, 2015 which she said went into savings; (Tr. 412), and we know she said the money she contributed to capitalize City Wide came from her savings. (Tr. 404) Moreover, the documents produced show that a million dollars was put into the City Wide account in February/March 2016 (GC Exh 37 a); but DanaMarie Pietranico claimed she only put about \$500,000 into the new company. Where did the other half a million dollars that was placed into the account come from? Also, on March 2, 2016 an additional unexplained \$192,464.86 was deposited into City Wide's account, #xxxx83188. (GC Exh 37 b) Additionally, it should be remembered that City Wide had no credit lines of its own to draw upon during this critical time frame. (Tr. 407)

The testimony was clear that City Wide did not get paid for its invoices until after 60-90 days after invoice; so this money could not have come from any invoicing done by City Wide for work performed in the week prior. (Tr. 423; See

also, Tr. 406-407 (where DanaMarie Pietranico could not remember when the first customer checks came into City Wide)) It was noted on GC Exh 37 (a) that an erroneous deposit of \$461,481.05 made on February 24, 2016 which came from Nico, was returned to Nico. Without Nico's records one cannot verify where that money, or any other money, actually came from. Or whether the money deposited in City Wide's account came from Nico like the "erroneous" deposit did.

It is requested that an inference be made that the unaccounted for money came from either Nico Asphalt or Michael Pietranico, Sr. since there is no other probable source for that kind of money coming into City Wide at the end of February 2016. Although Respondent had the opportunity to demonstrate where the capitalization of City Wide came from it chose not to provide any specific copies of checks or other documents that would have established the money's origin.

INTERACTION BETWEEN 175 AND NICO/CITY WIDE—DEMAND UPON CITY WIDE TO BARGAIN & FOR INFORMATION:

Notwithstanding all of the facts brought out in the hearing, Nico and City Wide continue to deny their alter ego and successor status. In fact, throughout the relevant time period the Respondent has refused to provide requested information or to negotiate concerning City Wide. As early as May 19, 2016, several months after Nico claimed to have closed and City Wide commenced operations Local 175 forwarded a request that Nico respond and answer questions related to the issue of whether City Wide was its alter ego or successor. [GC Exh 23 (a)] In responding to the request for information, Respondent Nico made it clear that it was not responding on behalf of City Wide. [GC Exh 23 (b)] Thus, on July 1, 2016 Nico's

attorney responded to various of, but not all of, the questions submitted; never once advising 175 or Region 29, NLRB; that they had destroyed all of Nico's files in April 2016. In its response, Nico continued to assert City Wide had no agreement with or obligations to 175. (Id.)

On August 17, 2016 Local 175 made a demand upon City Wide to bargain with 175 for a collective agreement. {GC Exh 24} On August 23, 2016 City Wide appeared to reject meeting with Local 175 Representatives while asking whether 175 "can meet the parameters set by Con Ed of New York regarding the requirements of performing work in accordance with local wage and hour requirements as well as membership in the Greater New York Building Trades Association." [GC Exh 24 b] On October 6, 2016 Local 175 responded advising that 175's contracts have always met the requirements of local wage and hour requirements; and that being a member of the Building Trades Council was not an absolute requirement to bid on and perform work for Con Edison. [GC Exh 24 c]

Moreover, Con Edison's Standard Terms for Construction Contracts referred to in that August 23 correspondence did not apply in any respect to the myriad of other work; the 100s of Nico customers; that were transferred to City Wide by Nico including the work for Verizon, Welsbach, EJ Electric, Safeway, Hellman, Donella, Triumph, West Moreland, Network Infrastructure and many others. [Tr. 77, 414-415]

Local 175 again demanded that representatives of City Wide meet with it for the purpose of commencing bargaining over the wages, hours and working conditions of City Wide's asphalt paving employees. GC Exh 24 c] No negotiations

regarding City Wide ever took place. And it was not until October 6, 2016 that Local 175 learned for the first time that Nico itself was still operating, sub-contracting Verizon and Welsbach work. (Tr. 436-437) Upon learning that Nico remained in business Local 175 filed the instant charge on October 20, 2016.

SUGGESTED REMEDY:

Local 175 requests that an appropriate remedy make it whole for the actions of Nico and City Wide. This remedy should immediately preclude City Wide or Nico from implementing or enforcing the Local 1010 collective agreement in any respect going forward. That agreement should be void. The remedy should require Local 1010 to return the union dues it collected under its contract to the workers and the benefit fund contributions to the employer, (who should be directed to turn over said contributions to Local 175 Funds). The remedy should also require Nico, (or its alter ego City Wide), or City Wide, as a disguised continuance successor in interest to Nico; to abide by the Local 175 collective agreement not only for the period January 2016 to June 30, 2017, (which was the balance of the duration of the 175 contract); but for the period thereafter while the parties meet and negotiate about the wages, hours and conditions of work going forward for Local 175 members who should be offered immediate reinstatement. The Remedy should include payment to Local 175 Benefit Funds for all hours worked by City Wide unit employees from the week ending February 28, 2016 to the present; and should include back pay for all 175 members who, but for the actions of Nico and City Wide, did not have employment or who had employment but not at the rates and benefits required by the Local 175 collective agreement.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 2, 2018 he served the above Brief On Behalf of Charging Party in Case No. 29 CA 186692 upon the following individuals as noted:

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